

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPHERE 3D CORP., : Docket #23-cv-02954
Plaintiff, :
-against- :
GRYPHON DIGITAL MINING, INC., : New York, New York
June 27, 2024
Defendant.

-----:

PROCEEDINGS BEFORE
THE HONORABLE VALERIE FIGUERO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE DEPUTY CLERK: Sphere 3D Corp. versus
2 Gryphon Digital Mining, Inc, Case Number 23-cv-2954.
3 The Honorable Valerie Figueredo presiding.

4 Counsels, can you please make your
5 appearances for the record, starting with
6 plaintiff's counsel.

7 MR. WOLFE: Greg Wolfe on behalf of Sphere
8 3D.

9 THE DEPUTY CLERK: Defense?

10 MS. CARTER: Elizabeth Carter from Hogan
11 Lovells, representing the defendant and
12 counter-plaintiff Gryphon Digital Mining, Inc.

13 MR. WINTER: William C. Winter on behalf of
14 Gryphon Digital Mining, Inc.

15 THE COURT: Good morning, everyone. This
16 is Judge Figueredo.

17 So we have, I guess, two sets of disputes.
18 I have the letter from Gryphon that came in May
19 21st. It's at ECF-81. And then there was a
20 response by Sphere, May 28th. It was ECF-82. I
21 think we can start with that dispute first.

22 But I'll just -- I guess just before we get
23 into the details of the issues raised at ECF-81, I
24 just, by way of background, would just appreciate
25 just, you know, a very brief explanation as to --

1 just to get the context of what these two businesses
2 do. And I know there was, like, this spoofing
3 incident where these bitcoins were taken, but I'll
4 just admit I have no idea. I don't really
5 understand how bitcoins work or anything like that.
6 So if there's just some context or background that
7 you think would be helpful to better understand why
8 some of these -- you want some of these documents or
9 just to put some of these discovery requests in
10 context, I'd be very appreciative.

11 And either side can go ahead, or if both
12 sides want to give me the background, that's fine,
13 too.

14 MR. WOLFE: I'm happy to do --

15 MS. CARTER: Greg, do you mind if I go,
16 just because it sounds like our motion is going to
17 occur first?

18 MR. WOLFE: No problem. And I'm sure
19 you'll give a neutral recitation. And I would just
20 ask, Judge, if there's anything I disagree with, I'd
21 be given the opportunity to respond.

22 THE COURT: Yeah, no, and, again, this is
23 just my lack of understanding of, I guess, mining of
24 bitcoins. And I thought maybe before we got into
25 the disputes, it would just make sense for me to get

1 a better sense of what these businesses do. But I'm
2 happy to have both sides speak, if that's helpful.

3 MS. CARTER: Yeah. No problem. Elizabeth
4 Carter again for Gryphon.

5 So Gryphon -- my client, Gryphon Digital
6 Mining, Incorporated, is a digital miner, and what
7 that means is that it operates many, many, many
8 miners, which are very sophisticated computers, that
9 are constantly running and solving complicated
10 algorithms for the purpose of trying to obtain
11 bitcoin. And obviously, there is a market for the
12 value of bitcoin, which, you know, fluctuates up and
13 down quite precipitously one way and the other.

14 And so its business essentially is to, you
15 know, purchase, you know, thousands of computers,
16 find adequate hosting spaces for these computers to
17 operate. You know, they require a lot of
18 electricity, as you might imagine. They require
19 kind of a very specific environment, like a
20 condition in which they operate. It has to be cool.
21 As you know, computers break down. They need
22 maintenance. So making sure that the computers are
23 kind of constantly operating in order to solve
24 these, essentially, math problems with the hope of
25 getting bitcoin.

1 And then beyond that, there's also some
2 strategy involved to the extent that there are
3 various mining pools. So, you know, computers that
4 tend to be quite expensive that can essentially join
5 their forces together in order to obtain bitcoin,
6 which, again, has a value that fluctuates up or down
7 based on the market for that particular bitcoin.

8 THE COURT: Okay. So that's super helpful
9 because I think one of the disputes involved
10 information about the miners. And --

11 MS. CARTER: Yeah.

12 THE COURT: -- I guess I'll admit, I
13 thought at one point, I was like, are these actual
14 humans? It sounds like it's not. It's a computer.
15 So this is very helpful, Ms. Carter.

16 Mr. Wolfe, did you want to add anything?

17 MR. WOLFE: Yeah. I think Ms. Carter's
18 description is generally correct. And I'll admit,
19 the first time I heard about bitcoin mining, I, too,
20 thought that they were people in mine shafts.

21 The only additional context I'll provide is
22 some companies do what's called self-hosting,
23 meaning they host the miners themselves. Sphere
24 and, my understanding, Gryphon, too, they don't do
25 their own hosting. So what they do is they go out

1 into the market and they find third-party hosts,
2 who -- you know, they'll sign a contract with the
3 host. And, basically, that host is then responsible
4 for hosting the miners, doing all the things Ms.
5 Carter described, making sure the miners are
6 running, keeping them cool, et cetera, et cetera.

7 THE COURT: And is Sphere in the same
8 business, then?

9 MR. WOLFE: Exactly right. So Sphere and
10 Gryphon are in the same line of business. And to
11 give a little bit more background, then, I'll try
12 and be as neutral as possible.

13 The parties were, at one point, thinking
14 about merging, and as part of merger negotiations,
15 the parties agreed to enter into a management
16 services agreement in which Gryphon -- and I'll just
17 track the language -- became the exclusive provider
18 of management services, basically, for Sphere's
19 crypto operations. Sphere does have some legacy
20 operations from before it became a crypto company,
21 but generally, its business is just
22 cryptocurrencies. So they're both crypto miners in
23 the same industry.

24 THE COURT: Okay. Okay. So then, Ms.
25 Carter, I guess since we're going to start with the

1 dispute at ECF-81, did you want to go ahead?

2 MS. CARTER: I would love to. Thank you
3 for the opportunity to speak, Your Honor.

4 Fortunately for us, at least the first
5 issue that's been teed up for Your Honor, this
6 so-called spoofing incident, doesn't necessitate a
7 deep understanding of cryptocurrency and miners to
8 kind of grasp what the issue is.

9 So what we refer to as the, quote/unquote,
10 spoofing attack in shorthand really refers to an
11 incident that happened in January of 2023 between
12 Sphere and Gryphon. And what it included was
13 basically, at that time in January, there was a
14 third-party hostile actor that was basically able to
15 kind of infiltrate Sphere's systems and basically
16 impersonate its CFO, Kurt Kalbfleisch, using a very
17 similar, but slightly different email account in
18 order to kind of induce Gryphon's CEO, Mr. Chang,
19 into sending this third-party actor bitcoin, as
20 opposed to Sphere.

21 So Mr. Kalbfleisch, you know, sends an
22 email -- you know, the real Mr. Kalbfleisch sends an
23 email to Mr. Chang, says, you know, pursuant to
24 this, you know, agreement that we have, that we're
25 operating under the MSA, please send us, you know,

1 this number of bitcoin, and then Mr. Chang responds.
2 And then at that point, a third party who was not
3 Mr. Kalbfleisch, although, using an email that is
4 extremely close to his real email, just with an
5 additional S -- so instead of "Sphere," it says
6 "Spheres" -- is able to somehow insert him or
7 herself into the email and basically kind of takes
8 over the conversation from Mr. Kalbfleisch and says,
9 you know, Gryphon, you should, you know, send us the
10 bitcoin, you know, to this wallet. It's the new
11 one, yada, yada, yada.

12 It's basically total chicanery farce that,
13 unfortunately, resulted in Mr. Chang sending bitcoin
14 to a wallet that was actually unaffiliated with
15 Sphere, so it was fraud.

16 So in the second amended complaint, which
17 was filed by Plaintiff, and that's at ECF-36, it's
18 riddled with references to this spoofing incident.
19 I actually counted beforehand, and I think of the
20 approximately 100 or so paragraphs in the paragraph,
21 24 of them actually describe and reference the
22 spoofing incident. And then there are another -- I
23 think there were 36 times that either "spoof" or
24 "spoofing" is used. So suffice it to say, it
25 features largely in the complaint.

1 So Sphere essentially blames Gryphon for
2 the incident. It says that Mr. Chang, he shouldn't
3 have been fooled so easily by this third party, and
4 that it's -- you know, the fact that he was fooled
5 really evidences a lack of internal controls that
6 Gryphon had. And that really underlies both its
7 breach of contract, the MSA agreement, and also
8 another claim that Sphere has lodged against
9 Gryphon, which is breach of fiduciary duty.

10 And that's, for example, at paragraph 5 of
11 the second amended complaint where it says: Gryphon
12 and Mr. Chang, however, recently found for multiple
13 spoofing attacks targeting Sphere's digital assets
14 that would -- and this is the key part -- that would
15 have been avoided had Gryphon had internal control
16 systems and policies and procedures in place and
17 adhered to applicable law.

18 So, not surprisingly, given the number of
19 times that this spoofing incident was referenced in
20 the complaint, Sphere has sought discovery of
21 Gryphon into the incident through its document
22 requests that were exchanged by the parties, more
23 recently, in April of this year. For example, at
24 Request Number 3, Sphere thought all documents and
25 communications relating to Gryphon's internal

1 policies. Again, that's at Request Number 3.

2 We objected, but agreed to produce
3 documents pursuant to a reasonable search and
4 agreement by the parties on things like search
5 terms, et cetera.

6 And, likewise, Gryphon asked for discovery
7 of Sphere into this spoofing incident, and that
8 really is what forms the basis for the parties'
9 present dispute. So Gryphon -- and this is at
10 Request Number 17, 18, 19, and 24, and I'll just
11 kind of summarize them here, rather than read each
12 one into the record; although, you know, if Your
13 Honor prefers, certainly I can do that. But the
14 gist of these requests -- and I know because I wrote
15 them -- was that, essentially, you know, we want the
16 information into, essentially, your internal
17 control, because, you know, it's our position that,
18 while you assert that, you know, this spoofing
19 incident was Gryphon's fault, you know, we actually
20 think it was your fault because how did this
21 third-party actor even get into your system in the
22 first place?

23 And so, therefore, we ask for documents
24 concerning their cybersecurity hardware, documents
25 that maybe have reflected any sort of forensic

1 investigation that Sphere did after the incident,
2 and then any communications kind of underlying its
3 claims that it was basically Gryphon's fault that
4 this incident happened.

5 So, essentially, our argument is pretty
6 simple. It boils down to the fact that, having
7 raised the claims regarding the spoofing incident in
8 the second amended complaint, Gryphon should be
9 entitled to probe Sphere's accusations that the
10 spoofing incident is Gryphon's fault, as opposed to
11 Sphere's. As the Court well knows and needs no
12 education from me on this point, but Rule 26
13 entitles civil litigants in discovery about
14 information that is relevant not only to a party's
15 claim, but also to its defenses.

16 And, here, discovery into the spoofing
17 incident goes right to the heart of Gryphon's
18 affirmative defenses as to the spoofing claims. For
19 example, in our fourth amended complaints -- and
20 this is at ECF-62 -- we've raised affirmative
21 defenses like failure to state a claim, unclean
22 hands, Sphere's claims against Gryphon are barred in
23 whole or in part by Sphere's own negligence. You
24 know, we deny Gryphon's allegations. For example,
25 the one that I read earlier by saying that, you

1 know, we deny that Gryphon's at fault here, you
2 know, and, instead, we think that this is really
3 Sphere's undoing.

4 So it seems like Sphere's entire kind of
5 objection by the way of producing any documents
6 about spoofing -- this isn't a situation where the
7 parties kind of disagree around, you know, the
8 margins as to, you know, what kind of narrowed
9 construction, you know, the parties will agree to.
10 Here, it's that Sphere's flat out refusing to
11 producing anything to Gryphon with respect to this
12 spoofing claim.

13 And I think -- as I understand the
14 argument, and Mr. Wolf I'm sure will go into it in
15 further detail, but as I understand it, they're
16 basically saying, well, you know, Gryphon, you
17 previously asserted an affirmative claim over the
18 spoofing incident for negligence, and because you
19 withdrew it, that claim -- that affirmative claim or
20 counterclaim against us, that means that you don't
21 get discovery into it. And on that one, really, we
22 just -- we don't understand it because I think the
23 language of Rule 26 is quite clear that, you know, a
24 party gets discovery not only into its claims, but
25 also defenses.

1 And then it also has raised this issue
2 that, well, you know, we're no longer seeking
3 monetary relief as a result of these allegations
4 about the spoofing incident. So because we're not
5 seeking any monetary relief, like, you shouldn't be
6 worried about it and you're not entitled to
7 discovery. But, you know, with all due respect, at
8 the same time, I said to Mr. Wolfe that, well, if
9 you're not seeking any monetary relief, then why are
10 you asserting the claim, you know, and we can kind
11 of all like go home and forget about the discovery
12 if you're willing to basically strike those
13 allegations from your complaint, because I don't
14 feel comfortable proceeding with the case if those
15 allegations remain live. Again, there are 24
16 paragraphs addressing it in the complaint, and he
17 refused to do so, which was well within his rights
18 to do so.

19 But, that said, the claims remain live in
20 the case and we're entitled to probe that. And so,
21 today, what we're here to ask the Court to do is
22 basically -- either if Mr. Wolfe has had an
23 opportunity to kind of reconsider his position,
24 accept his striking of those allegations, or if he's
25 not prepared to do that, we would ask for the

1 following: So Sphere, essentially -- as I
2 mentioned, this spoofing incident is the subject of
3 discovery on both sides. So they asked for
4 information about Gryphon's internal controls, and
5 then we obviously asked for information into the
6 spoofing incident and their internal controls.

7 The parties exchanged search terms. We
8 include a number of, like, specific search terms
9 that were specifically tailored to our requests
10 regarding this spoofing incident, you know, as
11 parties do. Sphere came back to us and said, you
12 know, here are the number of hits for all of these
13 requests -- or these search terms that you've
14 provided, including the specific ones that have to
15 do with the spoofing. And I'm talking about search
16 terms like "spoof" or "hack" or "attack."

17 And we know, based on the hit report that
18 Sphere gave to us, that all of the search terms that
19 specifically relate to the spoofing incident only
20 generate about 1,000 unique hits. And so our
21 position is that the information relating to the
22 spoofing incident is relevant. The Court should
23 order Sphere to produce these documents in full.

24 And if it's not willing to do that, we're
25 willing to accept yet another compromise; basically,

1 Sphere reviewing those around 1,000 documents that
2 we know hit on our search terms specifically defined
3 to get at those assets. And then we would,
4 furthermore, request that the Court orders Sphere to
5 produce any kind of report that we understand exists
6 stemming from Sphere's investigation into the
7 incident.

8 So with that, unless the Court has any
9 other questions, I'm happy to seize the podium, so
10 to speak, to Mr. Wolfe.

11 THE COURT: Just one, I guess. Just to sum
12 it up, it sounds like Gryphon's argument is that
13 there's these various -- or specifically 24
14 paragraphs in the complaint that reference the
15 spoofing incident. So even if Sphere is not seeking
16 monetary damages based off of the incident, there
17 are still allegations that support the claim. And
18 for that reason, you think they're relevant and
19 you'd be entitled to this discovery?

20 MS. CARTER: That's completely correct.
21 You very eloquently said what I said in 10 minutes
22 in about 30 seconds.

23 THE COURT: Okay. I just wanted to make
24 sure, because sometimes I miss it, and I want to
25 make sure I understand. So, you know, again, I'm

1 happy to give you time to respond once I hear from
2 Mr. Wolfe, if he wants to chime in.

3 MS. CARTER: Thank you.

4 MR. WOLFE: Sure, Your Honor. Thank you.

5 So let me start at the end and then I'll go
6 and provide some background.

7 What I would say is, lots of times parties
8 include allegations in their complaint to give the
9 court context into the claims. In this case, the
10 context of the spoofing attacks is, now that Gryphon
11 had been asserting meritless claims against Sphere
12 and that that is what prompted the lawsuit and that
13 they had been -- they had been advocating Scorsese
14 litigation against Sphere, unless Sphere exceeded to
15 their claims.

16 When we first filed the complaint, we had
17 needed to assert damages on those claims. And the
18 reason for that was Gryphon had purported to return
19 the stolen assets to Sphere, but it had done so with
20 reservation. It wasn't a true return. During the
21 course of the litigation, Gryphon gave up any claim
22 that it was, in fact, entitled to those assets. It
23 gave up any claim that Sphere had been negligent.

24 And here's the background I'll give you,
25 Your Honor. Gryphon -- after Sphere asserted its

1 complaint, Gryphon filed counterclaims asserting a
2 negligence claim, and Sphere filed a partial motion
3 to dismiss that claim on the ground that Sphere owed
4 no duty to Gryphon to prevent third parties from
5 impersonating Sphere. And based on that partial
6 motion, Judge Castel stayed all discovery, including
7 into the negligence claim. And Gryphon asked to
8 lift the stay, and Sphere opposed on two grounds:
9 Number One, that the claim was totally without
10 merit; and, second, that dismissal of that claim
11 would narrow discovery, including because it would
12 obviate the need for discovery into Sphere's
13 internal documents, into the phishing attack. And
14 Judge Castel agreed with us and maintained the stay.

15 And in response, and this tells you what
16 Gryphon thinks about its own negligence claim and
17 the notion that Sphere was negligent and owed to a
18 duty, Gryphon elected to dismiss the negligence
19 claim with prejudice. So Gryphon has no basis to
20 pursue internal discovery into Sphere, into Sphere's
21 reaction to the spoofing attack because it's not
22 ultimately relevant to any claim or defense.

23 We've disclaimed that we're pursuing
24 damages on our affirmative claims stemming from the
25 spoofing attack. But even if we had been, it's

1 simply not relevant to any affirmative defense that
2 Gryphon is purporting to raise, right. It raises
3 an -- we made very detailed arguments in our letter
4 about why that is so. There is an unclean hands
5 defense, but that only applies when a party is
6 seeking equitable relief, right. Unclean hands can
7 only be used to bar a claim for equitable release.
8 We're not seeking equitable relief.

9 And then a party's negligence is no defense
10 to a breach of contract claim, and it's also no
11 defense to a breach of fiduciary duty claim. So
12 we're not seeking damages based on the spoofing
13 attacks. There's no basis to pursue our reaction to
14 the spoofing attacks. And even if we were, Your
15 Honor, the affirmative defenses would just fail at
16 the outset because negligence isn't a defense to
17 breach of contract or to breach of fiduciary duty.

18 Your Honor, with that, I'm happy to answer
19 any questions you might have. Otherwise, I'll rest.

20 THE COURT: Ms. Carter, was there anything
21 you wanted to add?

22 MS. CARTER: Very briefly.

23 So I take Mr. Wolfe to say that, you know,
24 all of the numerous, numerous allegations about the
25 spoofing allegations and complaint are just context.

1 Well, if that's really true, then why is he pursuing
2 discovery as to it? He's never offered to withdraw
3 that discovery of Gryphon on this topic. And,
4 frankly, what I really don't want to happen here,
5 Your Honor, is I don't want this -- like, I don't
6 want Sphere to be able to kind of willy-nilly
7 whenever it wants to kind of bring out these
8 allegations about spoofing.

9 The spoofing incident is evidence that, A,
10 Sphere -- or my client, Gryphon, either didn't
11 perform under the MSA or did a bad job performing
12 under the MSA, or somehow there was a breach of
13 fiduciary duty as a result of that, and that's my
14 concern. If Mr. Wolfe really means what he says,
15 that it's just context, that he would be okay with
16 just basically reducing the statement to one
17 paragraph, I guess, in the paragraph, or -- and
18 additionally, not pursue discovery of it.

19 And then as to his position that negligence
20 is not a defense to breach of contract, as everyone
21 on this phone call knows, breach of contract, an
22 element of that is causation. And we're entitled to
23 say that Sphere cannot establish breach of contract
24 on the basis of these claims, because it wasn't
25 our -- it wasn't Gryphon's fault. It wasn't -- we

1 weren't the cause of this act of the spoofing
2 incident, and it's just completely unfair and -- and
3 like I said, I've offered, I think, a meaningful,
4 narrowing, even, of the request, as stated, to just
5 basically review the 1,000 or so hits that resulted
6 from our specific search terms, in addition to
7 ordering any reports that resulted from it. And,
8 frankly, I think that's very, very reasonable under
9 the circumstances.

10 And that's all I have. Thank you.

11 MR. WOLFE: May I respond very briefly,
12 Your Honor?

13 THE COURT: Yes. So, Mr. Wolfe, I just did
14 have a question.

15 MR. WOLFE: Of course.

16 THE COURT: Is part -- I guess, is part of
17 your breach of the -- breach of contract or breach
18 of fiduciary duty claims relying on an argument that
19 Gryphon somehow caused or lack of internal controls
20 led to the spoofing incident?

21 MR. WOLFE: For our affirmative claims, we
22 no longer need to rely on that because there's no
23 damage anymore.

24 THE COURT: Okay. So is there any part of
25 your affirmative claims that rely in any way on the

1 spoofing incident?

2 MR. WOLFE: Other than -- at this point,
3 other than for context, no, our affirmative claims
4 do not. And you have my representation, which I
5 think is binding.

6 THE COURT: So let me just ask, I'm just
7 curious, why are you seeking discovery about
8 their -- I guess the controls or whatever
9 obligations they had to prevent this spoofing
10 incident?

11 MR. WOLFE: You know, I think that's
12 probably an artifact, Your Honor, of a time when --
13 when that would have been relevant. Let me -- I'm
14 not sure that we actually need that discovery
15 anymore, so if I could, you know, give that some
16 thought. But I don't think we'll need it for
17 our ...

18 THE COURT: Because it sounds --

19 And Ms. Carter, you should let me know if
20 this doesn't work.

21 But it sounds like we have a representation
22 on the record from counsel that the spoofing
23 incident is not underlying any part of their claim.

24 And it sounds like Mr. Wolfe is going to
25 confirm whether he even continues to need this

1 discovery. It sounds like there wouldn't be a
2 reason for it. And so now it sounds like -- I don't
3 know how many -- how much Gryphon has already -- how
4 much discovery has already been provided on this
5 issue, but it sounds like there'd be parity and that
6 no one might potentially be providing discovery that
7 stems from the spoofing incident.

8 MS. CARTER: Thank you, Your Honor. I
9 would accept that representation with the caveat
10 that I would like to be able to basically raise this
11 issue to the Court's attention again to the extent
12 that Sphere continues in the future, to reference a
13 spoofing incident as a source of wrongdoing or
14 liability.

15 THE COURT: Okay. So maybe I can do this,
16 just to clear up, so we have, like, a record in the
17 future in case this becomes a problem later on. I
18 can enter an order sort of memorializing Mr. Wolfe's
19 representation. And then should there be a reason
20 to, Gryphon could have something to rely on if
21 there's a reason to raise it again.

22 MS. CARTER: Thank you, Your Honor. May I
23 just -- I think it's -- if I may, and I'm sorry. I
24 hope I didn't interrupt. It just seems cleaner to
25 me --

1 Greg, is there any reason why you just
2 can't agree on the record to strike those
3 allegations from the complaint?

4 MR. WOLFE: I don't know why I need to
5 strike allegations that are context to the
6 litigation. You know, the plaintiffs include
7 context in their claims all the time, right. We're
8 not seeking damages on the claims, and so it's a
9 question of what's relevant to the discovery, right.

10 The question is, are internal documents
11 relevant? So I don't see why I have to, Your Honor.

12 THE COURT: But I didn't think --
13 Sorry. Go ahead, Ms. Carter.

14 MS. CARTER: No, please. I'm sorry, Your
15 Honor.

16 THE COURT: It's fine. So I hear what Mr.
17 Wolfe says, but I do think, Ms. Carter, you'd be
18 protected if I make clear in an order what the
19 affirmative -- what the representation is by
20 counsel. So I just wanted to get Mr. Wolfe, again,
21 to say it on the record so I can write it down and
22 put it in an order. And I'm not misrepresenting
23 what he's saying either.

24 MR. WOLFE: Sure. We're not seeking
25 damages on our affirmative claims that stem from the

1 spoofing attack.

2 THE COURT: But I thought it was a little
3 bit -- and maybe this is just -- right. I thought
4 it was a little broader earlier, which is that no
5 part of your affirmative claims relied on the
6 spoofing incident.

7 MR. WOLFE: Sure. We will not be asserting
8 that there's a liability. I do want to make clear,
9 though, that doesn't mean that the spoofing incident
10 won't be relevant to our defenses that we're
11 asserting against Gryphon. And it's their burden to
12 us to articulate relevance on this. But as far as
13 our affirmative claims, we will not be.

14 MS. CARTER: I'm a little concerned. I
15 think we're actually backtracking here because if
16 you intend to raise this as part of your defense to
17 our allegations, that you breached the contract, and
18 you're going to throw it back in my face and say,
19 well, actually, you breached the contract here, I
20 don't see how that memorializes kind of the spirit
21 of what I think you're agreeing to here, which is
22 that it's no longer -- spoofing incident is no
23 longer a part of this case.

24 MR. WOLFE: Yeah, I didn't say that, and
25 that wasn't the basis for relevance articulated by

1 your side, ever, right.

2 THE COURT: Let me just ask, because I
3 might be missing something, if Sphere intends to
4 point to the spoofing incident in defense to some of
5 Gryphon's counterclaims, Mr. Wolfe, can you just
6 explain to me, then, why it wouldn't be relevant for
7 Gryphon to understand whatever internal controls or
8 procedures Sphere has?

9 MR. WOLFE: Sure. So I'll give two bases:
10 Number One, it's my adversary's burden to articulate
11 this, Your Honor, and they haven't articulated it.
12 I'm helping them out now because they never
13 articulated, but I don't want there to be any -- as
14 you said, I don't want there to be anything from
15 either side, a misunderstanding, and I don't want to
16 mislead the Court on that.

17 Number Two is, it's what I said earlier.
18 They've asserted but one claim, and that's that
19 there's a -- we breached our contract, right.
20 Negligence is, categorically, not a defense to
21 breach of contract. We cited case law to Your Honor
22 of that. There's only about four causations in
23 breach of contract. There's no proximate causation,
24 right.

25 So negligence is not a defense to breach of

1 contract. So there's a reason that they never
2 asserted that their affirmative claims have anything
3 to do with negligence. It's because negligence
4 couldn't -- our negligence, whatever it was, could
5 not be a defense. And, second, even if it could be,
6 we owed no duty to Gryphon. And Your Honor knows
7 this because they dropped the claim with prejudice
8 in response to our motion to dismiss, in which we
9 said that the reason it should be dropped is that we
10 owe no duty to them. There's simply no duty that
11 parties owe each other to prevent the spoofing
12 attack.

13 MS. CARTER: Your Honor, if I may offer
14 potentially a solution that could be helpful?

15 THE COURT: Sure.

16 MS. CARTER: Could we just -- I mean, I
17 would agree to a stipulation that basically says
18 that neither party asserts liability -- any
19 liability with respect to the spoofing incident, and
20 that the spoofing incident is not relevant to
21 discovery or should not be a subject of discovery.
22 I mean, if neither party is asserting liability with
23 respect to the spoofing incident, I just -- it seems
24 simple that we could just say that.

25 MR. WOLFE: Yeah. I think it's a defense

1 to the breach of contract claims you've asserted
2 against us, right. The spoofing attack is relevant
3 to that.

4 MS. CARTER: But we haven't asserted any --
5 we haven't asserted the spoofing incident as a basis
6 for a breach of contract claim. And as you said
7 earlier, we withdrew our negligence claim with
8 respect to spoofing. Spoofing is not any part of
9 our -- our affirmative case, and it won't be a part
10 of our defensive case, so long as you make a
11 representation that you're not promising any
12 liability on it.

13 MR. WOLFE: It won't be part of your --
14 I'm sorry, Your Honor, that we're doing
15 cross talk now.

16 THE COURT: No, no, no. If it's helpful,
17 if you can resolve the --

18 MR. WOLFE: Yeah. So -- I apologize. I
19 feel like we're on a meet and confer.

20 So it won't be a part of our affirmative
21 case. We're not seeking damages on it. We don't
22 need to.

23 But as far as -- you know, we do contend
24 that it's a -- as far as our defense case, right, we
25 contend that the spoofing attack was a breach as

1 part of the defense's case, and that that's a
2 defense for us. And that defense is --

3 MS. CARTER: Then we just come back full
4 circle to Rule 26, which says that either party is
5 entitled to discovery on any claims -- any party's
6 claim or defense.

7 MR. WOLFE: But, Your Honor -- and I'll
8 reiterate -- they still need to articulate a basis
9 of how they could use the discovery, and this was my
10 point, right. Even if -- even if we had thought
11 affirmative, right -- they only mentioned one basis
12 for relevance. But even if we have been seeking
13 damages and now we're on to our defenses, even if
14 it's a defense, they still have to be able to use it
15 in a way to defeat the defense. And it can't be
16 used because, A, it's not -- a party's negligence
17 has nothing to do with a defense to breach of
18 contract, ultimately; and, B, it just -- there's no
19 duty here.

20 THE COURT: So, Mr. Wolfe, I think I follow
21 you, but this is where you may have lost me. So it
22 sounds like Ms. Carter had represented that spoofing
23 is not part of Gryphon's case, and that her client
24 was not asserting liability with regards to the
25 spoofing, which sounds somewhat similar, if not

1 identical, to what you had previously said. But
2 then when you said why you needed discovery into the
3 spoofing from Gryphon, you said it would be relevant
4 to your defenses to their claim; am I right?

5 MR. WOLFE: Correct. So an act can be,
6 right, a breach of contract, right. So I no longer
7 need to pursue a breach of contract claim based on
8 this, because they've returned the assets and
9 they've now given up any claim to the assets.

10 But they've claimed that Gryphon breached
11 the contract, that Gryphon breached the -- excuse
12 me. They've claimed that Sphere breached the MSA,
13 and I'm entitled to assert that they breached the
14 MSA as a defense, right. And that's the difference,
15 right. I'm not trying to argue -- I mean, that's
16 the inherent difference. I'm able to assert it as a
17 defense on a contractual ground.

18 THE COURT: And your defense would be that
19 they breached the contract because they were
20 negligent in preventing the spoofing?

21 MR. WOLFE: Not negligent, necessarily,
22 Your Honor. By disobeying the plain terms of the
23 contract, right. They're only allowed to -- they're
24 only allowed to respond to our written
25 construction -- instructions, right.

1 So to give you more background, Your Honor,
2 Gryphon held Sphere's digital assets as part of the
3 deal, right. And as part of that, they -- there's a
4 provision in the contract that they -- they have to
5 essentially obey our instructions to hold or sell
6 those digital assets. Obviously, they can't be just
7 transmitting those assets to a third party under the
8 contract. And so that's the distinction, Your
9 Honor.

10 THE COURT: Okay. So I just wanted to make
11 sure, because I thought you had told me none of this
12 was on defense. And it sounded like, potentially,
13 you were looking into Gryphon's negligence, but it
14 sounds like that's not really the argument you'd be
15 making. It'd be something related to whether they
16 were authorized to release this, based on whatever
17 the MSA required for instructions for bitcoin.

18 MR. WOLFE: Exactly, Your Honor. And it's
19 not -- and it's not a claim I'm -- right. And it's
20 not a claim I'm seeking further damages on anymore,
21 because I don't need to. Because they've -- right.
22 I did when I first filed the case because they were
23 asserting that -- you know, they were asserting that
24 it was our fault, essentially. I don't need to
25 anymore because they've conceded that, right. They

1 dismissed their negligence claim with prejudice, and
2 so I don't need to anymore.

3 But as far as a contractual defense, I
4 still maintain it, and they didn't raise it. But I
5 want to -- they didn't raise it in this conference
6 as a basis of relevance, but I want to be very clear
7 with the Court that it will be relevant to our
8 affirmative claims in terms of context, but it's not
9 a basis of "I need to establish liability against
10 them." In order to prove my affirmative claims, I
11 won't be seeking to do it, I won't be seeking
12 damages from them. As far as a defense, it will be
13 relevant to this defense.

14 THE COURT: Okay. So, Ms. Carter, I guess,
15 given what we've discussed with Mr. Wolfe, I guess
16 I'm -- I'm not seeing a clear link showing why this
17 information would be relevant to Gryphon's case.

18 MS. CARTER: Right. So if Mr. -- first of
19 all, to be very clear, our breach of contract case
20 has to do with Sphere violating exclusivity
21 provision. Okay? I don't see how information
22 relating to the spoofing incident is relevant to
23 that.

24 But in any event, if they somehow construe
25 our breach of contract claim as involving or is

1 warranting the spoofing incident as part of its
2 defense, then we've come full circle, and I need
3 discovery into the spoofing incident so that we can
4 make an argument into that. And I think we're right
5 back where we are, which is I've already made a
6 reasonable proposal myself. Even though Sphere
7 hasn't offered any narrowing options of our
8 discovery, I have offered to narrow my own request
9 by saying, okay, then you need to review the 1,000
10 documents that hit on our specific search terms for
11 the spoofing incident, review those, and then
12 produce any that are not privileged, in addition to
13 any reports.

14 I just feel like Mr. Wolfe, in some ways,
15 is talking out of both sides of his mouth. It is in
16 the case. It's not in the case. It's just context.
17 And, frankly, these are not clear lines. And I
18 think that the best thing to do would be either, if
19 it's at any -- if it forms any part of any party's
20 claim or defense, there should be discovery into it.

21 MR. WOLFE: Yeah. And I'll just end with,
22 Your Honor, it's still their burden to articulate
23 how they would use the discovery. And even if it's
24 part of my defenses, I'm not hearing how they could
25 use the discovery as a defense -- you know, as a way

1 to (inaudible), right. There's no articulation of
2 how we have a duty.

3 They basically admitted we don't have a
4 duty by dismissing their own negligence claim of
5 prejudice. And there's no articulation of how it --
6 you know, how they would say, if I say you breached
7 the contract and that's an antecedent breach, that
8 forgives performance, that they can then say, well,
9 Sphere, you were negligent, you can't use that as a
10 defense, right. The case was very clear.

11 The concept of negligence, those are tort
12 concepts. They don't have anything do with contract
13 with --

14 MS. CARTER: Just to be clear, I mean, the
15 argument that I made earlier with respect to the
16 elements of a breach of contract are true on both
17 sides, right. If I have to prove up on a breach of
18 contract and you're basically saying you can't prove
19 causation because I think that, you know, you were
20 breaching under the contract, then it is relevant to
21 that.

22 And I just -- I don't -- I can't imagine a
23 world in which that you can assert an affirmative
24 defense that you're unwilling to give up, that I
25 don't get, under Rule 26, discovery into that, even

1 the limited discovery I've asked you to review.

2 MR. WOLFE: Sorry, Your Honor. I have one
3 more back-and-forth.

4 I think I'll reiterate it, which is, you
5 know, we cited very clear case law on this, that --
6 you know, you normally -- you see the four elements
7 of breach of contract. It's usually an agreement, a
8 breach, material, and damage, right. You normally
9 don't see causation. It is probably true that "but
10 for causation" is an element.

11 But we're aware -- we cite case law telling
12 Your Honor that negligence concepts are just not
13 applicable to breach of contract. And I don't hear
14 my adversary, who's seen that case law for a month,
15 prepare to propose a case to you that says, no, no,
16 actually, these negligence concepts are applicable
17 in breach of contract cases. And the fact that one
18 side didn't exercise reasonable care forgives my own
19 breach, right. And -- and --

20 MS. CARTER: Sorry.

21 THE COURT: Mr. Wolfe, are you done or ...

22 MR. WOLFE: I am done.

23 THE COURT: And, Ms. Carter, did you want
24 to respond?

25 MS. CARTER: Just one thing.

1 I mean, Mr. Wolfe just conceded that "but
2 for causation" is a component of breach of contract
3 and we have -- there are -- there are affirmative
4 defenses that you failed to say the cause of action.
5 Just because we did not pursue a motion to dismiss
6 does not mean that we've conceded anything. And I
7 just -- I think that we are very, very far into the
8 minutia, which is, frankly, not required under Rule
9 26, which, in this context, provides a broad
10 standard for relevance.

11 And I think I've been more than reasonable,
12 willing to make all sorts of representations on the
13 record. I've been willing to, as a result, drop the
14 discovery, but I'm not willing to drop the discovery
15 if it remains an issue in the case, whether it's
16 part of someone's claims or defenses.

17 THE COURT: I think -- so I'm just going
18 to -- if we want to just table this one and move on
19 to the next issue. So that's the dispute that
20 Sphere raises like (inaudible) --

21 MR. WOLFE: Yes. Thank you. Give me one
22 moment, Your Honor, if I may.

23 Okay. So, Your Honor, I guess we'll go
24 back to our affirmative claims. So the -- the gist
25 of our theory is that -- excuse me. Sphere has

1 brought a breach of fiduciary duty claim predicated
2 on Gryphon treating its miners and investment
3 strategies better than Spheres. The gist of our
4 claim is that Gryphon undertook a fiduciary duty to
5 Sphere to treat basically Sphere's property as if it
6 were its own property, and that it prioritized its
7 own interests over those of Sphere.

8 And I saw a reference in my adversary's
9 letter that we -- you know, we haven't pleaded any
10 facts to support the claim. The fact is -- are that
11 based on monthly reports that we've received and
12 reviewed, Gryphon's miners consistently outperformed
13 Sphere's miners, and Sphere has studied the issue.
14 It's looked into potential explanations, and it
15 can't find a legitimate explanation. You know, the
16 machines, the way the machines operate, if they're
17 all being operated by the same operator or, in this
18 case, provider, they should all perform basically
19 equally. It shouldn't be a case where Gryphon's
20 machines consistently outperform Sphere's.

21 Now, if Gryphon wanted to avoid discovery
22 on this issue, it was incumbent to move to dismiss
23 the claim on the pleadings, and Gryphon opted not to
24 move to dismiss the claim; thus, conceding its legal
25 sufficiency. There's no dispute, nor can there be,

1 that the claim is legally sufficient. And even if
2 Gryphon wants to say, well, we haven't conceded
3 that, the claim remains in the case, and it will
4 until summary judgment, which won't be heard, you
5 know, probably for another six months, should either
6 side choose to move.

7 Now, nevertheless, Gryphon's contention is
8 that it should not have to yield discovery on the
9 subject because it doesn't like the claim, it
10 doesn't think much of it, and that's not permitted
11 by the discovery rules. What Gryphon can't do is it
12 can't concede the legal sufficiency of the claim by
13 not moving to dismiss and then refuse to give any
14 discovery that would validate our allegations and
15 then assert on summary judgment that Sphere has
16 failed to do sufficient facts to support the claim,
17 precisely because Gryphon has withheld discovery.

18 Gryphon has asserted no particularized
19 relevance objection. You don't see a relevance
20 objection anywhere in their R and Os. And what you
21 do see are boilerplate objections of an undue burden
22 overbreadth, and disproportionality. And the burden
23 is on Gryphon, of course, to assert an objection
24 there. And what we're ultimately asking Gryphon to
25 do is nothing that we're unwilling to do ourselves

1 and that Gryphon hasn't asked of us.

2 And in terms of overbreadth, undue burden,
3 proportionality, the law in the district is clear:
4 What's good for the goose is good for the gander.
5 And Gryphon has no response for that -- I'm sure
6 Your Honor has heard that a thousand times. Gryphon
7 has no response to that background principle, other
8 than just to wave it away and say, well, our
9 discovery into Sphere shouldn't matter.

10 Gryphon's seeking the exact same intrusive
11 discovery into Sphere's business. It simply states
12 that the Court should assume that its claims are
13 going to have merit and that Sphere's claims won't,
14 and, thus, it should be permitted to seek
15 wide-ranging discovery into Sphere's business, and
16 that's not fair.

17 Gryphon has not suggested how the request
18 will increase the volume of documents it has to
19 review and produce. Although we sent search terms
20 to Gryphon weeks ago, Gryphon just produced its hit
21 report after we filed our letter. And in its
22 letter, it asserts that our hit report hit on 80,000
23 documents, and that's twice the number that Sphere's
24 agreed to review. So it's evidence of overbreadth
25 and undue burden, and that's, at best, misleading,

1 Your Honor.

2 We were very clear that -- right, we sent
3 an initial set of search terms and, of course,
4 that's subject to negotiation. It looks like one of
5 the terms wasn't appropriately calibrated and it
6 returned something like 40,000 unique hits. And, of
7 course, Gryphon responded that it's going to remove
8 that term and substitute new terms in, and our
9 expectation -- and we're not going to ask Gryphon to
10 do anything we're unwilling to do. Our expectation
11 is that Gryphon will review around the same number
12 of documents that we will, ultimately, where we're
13 hoping to land somewhere around 40,000. And --
14 nothing Sphere's unwilling to do.

15 So the notion that our search is asking
16 Gryphon to search for something unreasonable is
17 baseless. We're only asking Gryphon to search
18 documents that hit on search terms and to produce
19 go-gets, which we define as easily identifiable
20 documents, such as mining reports that are not
21 necessarily amenable to search terms, but that a
22 party knows exists and are easily -- that can easily
23 be produced.

24 Obviously, we're not asking Gryphon to
25 search for needles in haystacks as part of this, but

1 in our experience, oftentimes, parties do generate
2 mining reports and performance reports, and they
3 basically know where to find those documents.
4 They're either centrally located or they all come
5 from the same email address. So there's a program
6 called Minder Report. And so every day, you'll get
7 a report from @minderreport.com sent to your email.
8 You know, that's something we would expect that
9 Gryphon knows and can easily produce.

10 There's nothing about those reports that
11 will raise privilege concerns that can be identified
12 through one single search term. So there's been
13 nothing to suggest that, what we're asking them to
14 produce through these requests, is going to somehow
15 exacerbate the burden on them or, you know, cause
16 them to do something, again, that we're unwilling to
17 do.

18 I just want to note, they say that what we
19 basically asked is for discovery into the entire
20 business, but I don't think that's quite right.
21 Like we discussed at the beginning, Your Honor,
22 Gryphon and Sphere are in the business of mining,
23 and they send their miners out to hosts. It's the
24 host that really ensure the operation of the miners.
25 But what the customer does is they say if their

1 miners are down, if they're not performing up to
2 snuff, they'll then reach out to the host and say,
3 why is this going on? Can you repair my miners?
4 Can you improve this? Can you make it so that they
5 run better?

6 It's not like Gryphon and Sphere, I don't
7 think, at least, are generating, you know, hundreds
8 of emails every day about the operation of miners,
9 and I haven't heard that from the other side.
10 Gryphon does lots of stuff that we're not seeking
11 discovery into. It purchases miners. It has
12 employees, right. It rents space. It raises money.
13 It has securities filings. We're not seeking any of
14 that.

15 What we're seeking is how -- their searches
16 for hosting. My understanding is they have about
17 one or two hosting partners. So you find hosting,
18 and then, presumably, you're not doing much else
19 beyond that. And then, like I said, you're making
20 sure that the host keeps your miners operational,
21 and that's what we're really after here. And we're
22 not -- we're not going to be asking that -- you
23 know, search for tens of thousands of additional
24 documents that don't hit on a search term universe
25 that's not proportional to what we'll agree to

1 search for, too.

2 I want to address the cases that my
3 adversary cited. One is the Edmondson case, which
4 states that disclosure should not be directed simply
5 to permit a phishing expedition. And that line of
6 case law really goes to where relevance is at issue.
7 Parties have failed to articulate relevance, and
8 that's not this case -- the relevance is clear. We
9 have an allegation that Gryphon's miners
10 outperformed ours, but, of course, we need discovery
11 to validate that allegation. And the relevance is
12 clear, and there is no relevance objection.

13 Gryphon also notes -- cites the Viossi
14 (phonetic) case for this proposition, that
15 proportionality and relevance are conjoined
16 concepts. What Viossi (phonetic) is saying is the
17 greater the relevance of information in an issue,
18 the less likely discovery will be found to be
19 disproportionate. And, again, the discovery we're
20 seeking is directly relevant to our claim. We need
21 to know how Sphere's miners performed. We need to
22 know how Gryphon's miners performed, and we need to
23 know why Gryphon's miners performed the way they did
24 and why Sphere's miners performed the way they did.

25 So with that, unless Your Honor has

1 questions, I'll turn it over to my adversary.

2 THE COURT: No. Mr. Carter, I understand
3 the argument on this one.

4 Ms. Carter?

5 MS. CARTER: Yes. Thank you.

6 THE COURT: I got the names wrong. I
7 apologize.

8 MS. CARTER: No, it's okay.

9 So, first of all, on this issue that, you
10 know, we haven't -- we refuse to provide discovery,
11 first of all, that's not correct. I have actually
12 offered to provide Gryphon with narrowly tailored
13 discovery that seems extremely relevant to whatever
14 claims that it's asserting, essentially agree --
15 agree to produce documents that, you know, discuss
16 the relative performance of Gryphon's versus
17 Sphere's, but that wasn't good enough.

18 The major problem that I have here, which I
19 have asserted since the beginning, is that Sphere
20 refuses to limit its requests, which do go to the
21 heart of Gryphon's business. For example, I mean,
22 even the example that Mr. Wolfe provided about, you
23 know, communications between Gryphon's and its --
24 its hosting companies about whether or not miners
25 are online or offline, like that would be

1 encompassed by Mr. Wolfe's, like, very broad,
2 far-ranging discovery, which includes all documents
3 and communications concerning Gryphon's efforts to
4 ensure the operations of its miners.

5 So my issue from the beginning, and,
6 frankly, I think that Sphere has been unreasonable
7 in that it has not come back with any suggestion for
8 the narrowing of these overbroad requests. And with
9 respect to proportionality, the argument there is
10 clear, I can identify one factual assertion that --
11 in the complaint that Sphere has that underpinned
12 this fiduciary duty claim on this kind of
13 self-prioritization concept, which is that -- I'm
14 reading from paragraph 47 right now. For example,
15 on a monthly basis, Gryphon has reported a
16 substantially higher mining efficiency ratio than
17 Sphere, which would not occur if Gryphon were acting
18 to avoid self-dealing.

19 Well, first of all, I contest that that's
20 the only explanation for why there might be
21 differences in efficiency ratios. But, moreover,
22 why does that one allegation that's completely
23 conclusory entitle Sphere to all sorts of
24 information about Gryphon's business that has
25 nothing to do with Sphere? I, frankly, don't

1 understand that, and I think Mr. Wolfe has been
2 unreasonable in refusing to engage in real
3 discussion about the narrowing of those terms.

4 Although, you know, the only suggestion
5 that Mr. Wolfe has made is that, well, we can use
6 search terms and that will ameliorate any burden
7 concern that you have, Gryphon. Well, we ran the
8 terms -- and, by the way, Mr. Wolfe knew that we
9 were on the cusp of producing a hit report when he
10 decided to file the letter motion on Friday evening.
11 That was his prerogative to do so. And I understand
12 why he did it because he obviously wanted to tee the
13 issue up with enough time for Your Honor to hear it
14 today. That's fine, but then don't criticize me
15 that you didn't have -- you know, you didn't have
16 the information from me that -- that underscored the
17 burden that's associated with this far-flung
18 discovery.

19 And not only that, he's not even agreeing
20 to just cap, essentially, the discovery at whatever
21 search terms or the application of search terms
22 applied to the documents for custodians. He's not
23 even agreeing to a cap it at like the 80,000 or
24 whatever documents. He also wants certain
25 unspecified, quote/unquote, go-gets, which go to

1 Gryphon's only business, having nothing to do here.
2 And he provides, by way of example, reports, things
3 like that, and, "Oh, don't worry, I won't ask you
4 for other things." But, frankly, anything that
5 Gryphon does that it knows of, that is potentially
6 responsible, is potentially at fair game under the
7 parameters of his discovery.

8 Although, for example, although the parties
9 have agreed to four custodians, there's more than
10 four people who work at Gryphon. And so does that
11 mean I have to go rooting around all of their emails
12 trying to find, oh, I'm going to email X person
13 about our miners. How are they doing at the host?
14 Are they okay? Again, none of this has anything to
15 do with Sphere. And, frankly, I don't even
16 understand, then, the purpose of applying search
17 terms, because under this, like, theory that I still
18 have to provide, notwithstanding the search terms,
19 additional documents that are responsive, that are
20 go-gets, like, then why would I just have to review,
21 like, for example, the entire mailbox of Ron
22 Chang -- of Rob Chang, the president of Gryphon,
23 that this is what he does all day, every day, you
24 know, manage the miners, think about where are we
25 deploying them, which pool should we use?

1 And, frankly, I don't understand why Mr.
2 Gryphon -- or Mr. Wolfe needs this for the purposes
3 of his claim. He apparently has access to reports,
4 unspecified reports, that show in his
5 characterization that, allegedly, Gryphon's miners
6 are doing better than Sphere's. I mean, he has that
7 information. So if he has that, why does he need to
8 have invasive discovery into Gryphon's operations of
9 its own miners that have nothing to do with Sphere?

10 And for that reason, I have consistently
11 objected to the overbreadth and proportionality of
12 the request. And I take issue with Mr. Wolf's
13 position that I didn't raise relevance as an
14 objection in response to these requests. Quite
15 clearly, relevance is part of the proportionality
16 consideration. And to the extent that there is any
17 relevance here to the fiduciary duty claim, we would
18 maintain that it is small. And in light of that
19 small amount of relevance, we have commensurately
20 agreed to produce a narrow set of documents, which
21 apparently is just, frankly, not good enough for Mr.
22 Wolfe.

23 And in terms of the goose and the gander,
24 I'm not sure what he's referring to. If he's
25 referring to the document request that he's agreed

1 to respond to that are not the subject of a motion
2 to compel, frankly, I don't understand. It's not
3 incumbent on me to make arguments for him on what he
4 should object to or not object to or agree to
5 produce. And all of the document requests that he's
6 referring to are specific to Sphere's engagement
7 with third parties, which is the entire basis of
8 this lawsuit, is that that was in breach of an
9 exclusivity provision under the MSA.

10 I would submit that this fiduciary duty on
11 the basis of the relative performance of miners,
12 so-called justifying, that sort of far-flung
13 discovery, is just a sideshow, and I hope that the
14 Court can appreciate that. And, again, I think I've
15 more than met my obligations to meet and confer. I
16 didn't just stand on my objection to producing
17 documents. I offered to compromise. And my offers
18 of compromise have been met with nothing, no
19 yielding on the other side. And I don't think that
20 the Court should countenance that type of broad
21 discovery on kind of threadbare allegations about
22 respective performance. Thank you.

23 THE COURT: So I guess just a question,
24 because it seems like there's a few categories of
25 topics that are at issue. And so I'm just curious,

1 the topic relating to the selection of mining pools
2 for Gryphon, I just want to understand the process
3 that went on. Is this where you ran the search
4 terms and the hit report had 80,000 documents?

5 MS. CARTER: Yeah, it's a good question.
6 It's a little confusing. Sphere -- if I may answer,
7 and then, of course, Mr. Wolfe will weigh in,
8 but ...

9 So Sphere propounded these requests,
10 including a request for, what is, a selection of
11 mining pools, right. And they said, don't -- I
12 said, that's -- you know, that's too much. It's too
13 burdensome. And they said, well, don't worry about
14 it, we'll give you search terms.

15 They gave a search term for four
16 custodians. We ran them. That yielded 80,000
17 documents. And my point being that, is that even
18 there, even there, Gryphon has not -- or Sphere has
19 not limited itself to just reviewing those
20 documents. It's maintained that, in addition to
21 those documents that hit on search terms, I still
22 need to go out and find other documents that are
23 responsive to this request, which, as I've said, is
24 essentially Gryphon's business. So I just think
25 that these are extremely overbroad and unwarranted

1 in light of the relevance, if any.

2 THE COURT: But let me just ask, I guess,
3 is there no way to, perhaps, reduce the number
4 either through more targeted search terms or fewer
5 custodians or a time period?

6 MS. CARTER: It's certainly possible. And,
7 frankly, you know -- again, Mr. Wolfe didn't have
8 the benefit of the search report when he kind of
9 initiated this process. But, again, I would
10 maintain that, unless Mr. Wolfe is willing to limit
11 discovery to the application of reasonable search
12 terms across four custodians, then it's kind of like
13 a Sphere victory in some ways, because he's still
14 asking for these unspecified categories of,
15 quote/unquote, go-gets for the same --

16 THE COURT: And what's the -- so let's
17 say -- what's the -- when you say unspecified
18 categories of go-gets, are these the monthly reports
19 that reflect Gryphon's miners -- what miners --
20 Gryphon miners have done?

21 MS. CARTER: Yeah. If you don't -- I'm
22 just going to read -- so I'm sorry. If you could,
23 do you mind holding on just one second?

24 THE COURT: Yeah, no worries.

25 MS. CARTER: Hold on, Mr. -- I just -- I

1 want to answer -- be responsive to the judge's
2 request.

3 So here -- so I'm now reading from a letter
4 that I received on June 3rd from Mr. Wolfe. And it
5 says: "In addition for certain requests, it will be
6 appropriate for Gryphon to produce so-called
7 go-gets, such as reports reflecting the performance
8 of Gryphon's miners and Sphere's miners. For
9 example, reports from Foundry and Coinmint
10 reflecting uptime and revenues generated, software
11 upgrades, Gryphon's internal policies,
12 communications with potential hosts for Sphere's
13 miners, calculations reflecting consideration --"
14 ba-ba-ba-ba.

15 Like, it is -- but this -- and then "for
16 the avoidance of doubt, this list of go-gets is
17 illustrative, not exhaustive."

18 So, you know, even if we were like, okay,
19 we can get these search terms down to some, like,
20 manageable number, like I just -- there's an
21 infinite number of additional responsive material
22 that I would have to produce.

23 THE COURT: And I suppose I don't -- do we
24 know what the universe -- I guess you don't have a
25 number for the universe of these go-get documents?

1 MS. CARTER: No, because I don't even know
2 what the universe of those documents is. Like,
3 go-get --

4 MR. WOLFE: Your Honor --

5 MS. CARTER: Go ahead.

6 MR. WOLFE: May I respond, Your Honor?

7 THE COURT: Yes. Go ahead.

8 MR. WOLFE: Sure. So the 80,000 -- the
9 80,000 hit report number isn't real, right.
10 We've -- it's clear what we said, the hit reports.
11 Obviously, we're willing to negotiate that down.
12 And even in the email transmitting the hit reports,
13 Gryphon said to us, you know, this isn't a
14 reasonable number. We're going to -- we're going to
15 tweak some of the search terms.

16 I think one of them, right, it was clearly
17 something erroneous had happened in the term we had
18 suggested, right. It returned something like 60,000
19 or 40,000 unique hits. Obviously, there's something
20 wrong there. We have agreed to review about 40,000
21 search terms. We're not asking -- we're not going
22 to be asking Gryphon to review double the search
23 terms we reviewed. We want them to review a similar
24 number.

25 On the go-gets, I think in every

1 litigation, there are certain repositories of
2 documents that parties know won't necessarily hit on
3 search terms, but they never let -- agree to produce
4 and, of course, we've agreed to do that, right. If
5 I know that there's some category of report where it
6 hasn't hit on a search term, but I can run one term
7 and they're all there, of course I would produce it,
8 right. What I'm not asking Counsel to do is sift
9 through emails with additional terms where they're
10 not easily collectible.

11 Unless Your Honor has questions, I would
12 like to respond to some of the points my adversary
13 made.

14 THE COURT: No. Sure. Go ahead, Mr.
15 Wolfe.

16 MR. WOLFE: Sure. So my adversary
17 complained that she would be producing a lot of
18 communications with third-party hosts. That's sort
19 of expected. That's a very easy universe to search
20 for, right. You plug in one term, which is the
21 opposing side's, the counterparty's email address.
22 There's no privilege concern because they're
23 counterparties. And then you can batch hack all the
24 documents as relevant. Of course, you'll need to
25 review them for -- you know, in the context of

1 depositions, but that's very easy.

2 And, in fact, it's very similar to what our
3 adversaries have had no problem asking us to do.
4 And if I could, Your Honor, I'd like to read you
5 some of the requests they've served on us.

6 THE COURT: (Unintelligible.)

7 MR. WOLFE: Sorry. I'm sorry, Your Honor?
8 Okay. Fair enough.

9 I mean, if you line them up -- and I regret
10 not putting a chart in the -- in the letter, but
11 they're basically asking for the same discovery of
12 us. The only difference is they think our claim
13 isn't worth anything, right. You know, they don't
14 think we're going to prevail. Well, if they thought
15 we weren't going to prevail, they should have moved
16 to dismiss on the pleadings. And they didn't, and
17 so the claim is live.

18 I'm entitled to discover, right. I can't
19 just say, oh, your miners outperformed us. And then
20 I have them come back and say, well, look at all
21 these other -- right, we haven't given you any
22 discovery, right? Look at -- Court, look at all
23 these other countervailing reasons that the
24 miners -- our miners could have outperformed yours.
25 Thus, we weren't prioritizing our miners over yours,

1 right? It's just not -- it's not how discovery
2 works.

3 As far as the go-gets, look, we've
4 suggested -- let me return to that for just one
5 moment, right. We've suggested something that's
6 pretty common in litigation, right. Search terms
7 and then easily identifiable documents, whether
8 they're located -- whether you can identify them
9 because they're located in a central repository or
10 because you know that, right, at the top of the
11 document, the same term's going to reappear. They
12 always -- or they always come from the same email
13 address, and there's no privilege concern, yada,
14 yada, yada. The same exact thing we'll be doing in
15 our own searches and that Gryphon has asked us to
16 do.

17 Obviously, if opposing counsel thinks that
18 this procedure is unreasonable, right, A, we
19 wouldn't expect that they'd be asking us to do it,
20 and, B, they should let us know, right. We
21 suggested categories of documents that came to mind
22 and that seemed easily identifiable, right. Mining
23 reports, efficiency reports, and reports reflecting
24 uptime, which basically means, how long is your
25 miner operational?

1 Why is that relevant? Let's say -- let's
2 say Sphere's and Gryphon's miners go down at the
3 same time for some reason. And Gryphon emails the
4 host and says, get our miners back online first and
5 then get Sphere's miners back online, right;
6 obviously relevant to our claim. It should not be
7 something that is difficult for them to identify.

8 So with that, Your Honor, unless you have
9 questions, I'll turn it back over.

10 MS. CARTER: Thank you.

11 THE COURT: I guess, Ms. Carter, just to
12 maybe, perhaps, offer some type of compromise,
13 because it sounds like this might be a situation
14 where the parties can go back and meet and confer,
15 given that Mr. Wolfe acknowledges that they're not
16 asking you to search through the 80,000 documents
17 and there might be, perhaps, ways to narrow the
18 search terms to something that would yield fewer
19 results. Is that a possibility for resolution of
20 this?

21 MS. CARTER: I'm certainly willing to
22 continue to meet on this issue. I would just say,
23 and I just really don't want this to be lost on,
24 Your Honor, is that there is no -- okay. This case
25 is about the MSA. They say we breached it. We say

1 they breached it. That is the main show.

2 They've added this tagalong breach of
3 fiduciary duty claim, and the only factual
4 allegation they have to support it is they say
5 there's some report somewhere that says that
6 Gryphon's miners did better than Sphere's, and the
7 only reason -- explanation for that is because,
8 obviously, Gryphon was engaging in self-dealing.

9 Like, why does that one bare-bone
10 conclusory allegation entitle Sphere to access to
11 Gryphon's entire business, whether or not they're
12 search terms or not? Like, fundamentally, why does
13 Sphere get access to emails that have nothing to do
14 with Sphere's miners? I just reject the premise
15 that this is a fair scope of discovery.

16 And just to give, like, an example of the
17 types of documents that are subsumed by Sphere's
18 overbroad requests, they, for example, say, you
19 know, we need anything that's -- any documents
20 relating to Gryphon's, you know, offer -- or
21 Gryphon's efforts to ensure the operations of its
22 miners. Like, so do they want me to go and pull
23 invoices? Do they want every email, you know,
24 between the CEO and some third-party hoster saying,
25 "How are the miners doing today? Oh, the

1 air-conditioning broke. It's 98 degrees in here.
2 It should be 96." Like, I don't understand why they
3 should be entitled to that sort of far-flung
4 discovery, based on this bare allegation.

5 And, to be honest, I have to repeat it
6 again. I don't understand Mr. Wolfe's comparison
7 about the goose and the gander. And we've asked for
8 this and we've, you know, not asked for that. All
9 of the discovery that it asked for is directly
10 relevant to Sphere's admitted use of third parties
11 in contravention of the MSA. That is what this case
12 is about. It's obviously -- you know, it's not
13 based on a bare allegation. Gryphon has actually --
14 or Sphere actually admitted in public filings that
15 it's used third-party hosting. So it's -- like,
16 it's not a phishing expedition, because we know that
17 Sphere entered into agreements with third parties,
18 and we're trying to find out more about that for our
19 breach of contract claim.

20 By contrast, here, Sphere is saying one
21 conclusory allegation, that there's some report
22 somewhere that says that our things are doing better
23 than theirs, and then they say, okay, open up your
24 business, Gryphon. I fundamentally think that it is
25 not at all the same situation; although, Mr. Wolfe

1 tries to draw analogy between the two.

2 That said --

3 MR. WOLFE: Your Honor --

4 MS. CARTER: -- I'm happy to continue to
5 meet and confer on this issue, and we can always
6 revisit it with Your Honor, if we're unable to reach
7 agreement.

8 MR. WOLFE: Your Honor, if I may? It's a
9 notice pleading regime, right? I gave notice of my
10 claims. I'm not required to do anything more than
11 that. The Gryphon -- if it thought that it could
12 get this claim to dismissed on the pleadings, right,
13 if it thought our, allegedly, bare-bone allegation
14 was insufficient, it could have moved to dismiss,
15 and Judge Castel would have made a ruling. It knew
16 it wouldn't work, so it didn't move to dismiss.

17 I'm not hearing why it's burdensome to
18 produce communications between Gryphon's CEO and its
19 hosting counterparties, right. It's actually very
20 easy, right. Coinmint was a third-party host. I
21 believe there were really only two third-party
22 hosts. It's Coinmint and Core. Plug in "at Core"
23 and "at Coinmint" and simply produce the documents.
24 I haven't heard how many -- it's what we'll be doing
25 in response to their requests. It's not hard.

1 There's no privilege review involved.

2 And I'm concerned about the suggestion that
3 we just go back and meet and confer, because what
4 I'm not hearing is a concession, oh, the requests
5 are relevant here, or I think what Your Honor had
6 suggested was a good one and what we've already
7 conceded to, right, which is -- we know 80,000
8 search hits is way too much, right. We've agreed to
9 review around 30- to 40-, and we think that's where
10 Gryphon should be.

11 So I'm just not hearing why what we're
12 willing to do is so unfair to Gryphon at the end of
13 the day. And I would like a ruling that there is no
14 relevance objection here, right. There is a
15 proportionality objection, but there's no relevance
16 objection, and they shouldn't be able to withhold
17 documents from us on the basis of relevance. Of
18 course, we're not expecting them to search for --
19 through every single email they have to find
20 relevant documents. We've suggested a typical
21 process, which is search terms plus easily
22 identifiable documents, the exact same thing we'll
23 be looking through.

24 MS. CARTER: And one more thing, just to
25 address that. I just -- I don't even -- I don't

1 even see how Sphere has set up a discrete universe
2 of documents that it's asking the Court compel us to
3 review, given this amorphous concept, without detail
4 of, quote/unquote, go-gets of easily identifiable
5 documents. Even if the Court were to order
6 production in response to this to review, you know,
7 documents hitting on search terms and this amorphous
8 category, like, what is that category?

9 I think that there's, obviously, additional
10 room, you know, left for the meet and confer. And,
11 you know, perhaps, this, you know, was not timely
12 brought to the Court's attention, just in light of
13 the ongoing negotiation of search terms, et cetera.

14 MR. WOLFE: Your Honor, I think it was
15 timely brought before because I'm still not
16 hearing -- I confessed that our requests are seeking
17 relevant information. And, you know, we put in the
18 letter to Your Honor, right, what we said about, you
19 know, what our expectation for search is, which is
20 easily collectible categories of documents, namely,
21 what we know, mining reports, revenue information,
22 and communications with potential hosts.

23 And that's easily collectible. It's not
24 going to be an extraordinary number of documents.
25 Gryphon may not like that it has to produce it, but

1 there's a protective order in place. Obviously, we
2 will adhere to that. So, you know, I would
3 encourage -- you know, obviously, there's more
4 meeting and conferring to be doing because we need
5 to agree on a set of search terms. And, you know,
6 to the extent Ms. Carter has qualms about searching
7 for, you know, what I call go-gets, she can raise
8 those to me.

9 But I think it should be made clear that
10 our requests need to be responded to as written, at
11 least in terms of relevance.

12 THE COURT: So I guess just -- I think on
13 this issue, I see why some of these categories of
14 documents could produce relevant -- documents that
15 are relevant, excuse me, to Sphere's claims, but
16 part of the problem is, I think because there
17 wasn't -- I'm not blaming any side on this, but just
18 because there potentially could have been more meet
19 and confers to try to dwindle down the search terms.
20 I haven't really heard the undue burden argument
21 that I typically hear in other cases when parties
22 bring a burden argument where, you know, there's a
23 clear declaration or information concerning what the
24 burden would be of collecting a voluminous
25 production viewing it.

1 And it sounds like that's because there
2 could be more of a meet and confer to try to either
3 narrow the scope of the search terms or the
4 custodians or whatever the parties can come up with
5 to really get a sense of what the volume would be.

6 And in terms of the go-get documents,
7 again, it sounds like Mr. Wolfe is willing to have a
8 discussion about what potentially those documents
9 are, and then, perhaps, after a meet and confer, it
10 becomes evident or clear exactly where these reports
11 or documents might be found.

12 So this is all to say that I think the
13 parties should go and have a discussion, and if you
14 can't agree to narrow the scope of some of these
15 requests, recognizing that they seek relevant
16 information, but potentially are hitting on too
17 voluminous -- the document count is too voluminous,
18 you can always come back to me and we can address
19 the issue again.

20 MS. CARTER: Thank you, Your Honor.

21 MR. WOLFE: Thank you, Your Honor.

22 THE COURT: If you would like, just because
23 it's the summer and it tends to get busy, is I could
24 give you -- I can schedule you for a conference now,
25 and that way you know you have a date by when you'd

1 have to come back if you don't reach a resolution.

2 MR. WOLFE: That would be fantastic, Your
3 Honor, you know, for all our -- you may not have
4 known it from today, but I do think that the parties
5 have negotiated in good faith, and I expect we'll be
6 able to work it out. But it would be good to have a
7 date on the calendar.

8 MS. CARTER: May I ask a clarifying
9 question?

10 THE COURT: Sure.

11 MS. CARTER: To that end, it's somewhat
12 wrapped in this, but, yes, I think it would be very
13 helpful to have a date on the calendar to kind of
14 act as stick, so to speak, in forcing further
15 discussion on this topic. Just, you know, kind of
16 given the length of time that is taken to negotiate
17 search terms and all this and basically the scope of
18 the review, if the parties -- and I'm not saying
19 that we will need to, but if the parties decide that
20 we need additional time in the schedule to complete
21 discovery -- again, I'm not saying we will -- but
22 what would be the best kind of mechanism to bring
23 that to your attention, Your Honor?

24 THE COURT: Yeah. Let me -- let me -- I'm
25 just pulling it up, unless you happen to know the

1 scope of my referral?

2 MS. CARTER: I think you would --

3 MR. WOLFE: All pretrial.

4 THE COURT: Okay. It's just a general
5 pretrial referral?

6 MR. WOLFE: Yes.

7 THE COURT: Okay. So unless he's told
8 you -- I mean, I'm -- under the scope of that
9 referral, I can extend your deadline, unless he's
10 told you otherwise. But if you're working together
11 and you need more time, you know, unless you tell me
12 that Judge Castel said no on any extensions, I can
13 give you an extension.

14 MS. CARTER: Okay. That's helpful to know.
15 Again, that can -- you know, we can discuss it, and
16 this issue has not come up yet. I'm just
17 anticipating issues that may or may not arise down
18 the road. Thank you.

19 THE COURT: Of course. Yeah. No problem.
20 So I'm going to give you -- I just want to take a
21 few minutes to think about the issue we started
22 with, which was that ECF-81, and, that, I'll just
23 issue like, a very short -- very short order, just
24 giving you the resolution there.

25 MS. CARTER: Thank you.

1 THE COURT: And that won't take me long,
2 you know, either later today or tomorrow.

3 Is there any other issue anyone else wants
4 to raise?

5 MR. WOLFE: No, Your Honor. I would just
6 ask that, in scheduling, I have hearings on the 19th
7 and the 31st of July, so that you don't pick those
8 dates, if it's okay with Your Honor.

9 THE COURT: 19th and 31st?

10 MR. WOLFE: Of July.

11 MS. CARTER: And I'm also out this 15th
12 through the 19th, so if maybe we could just avoid
13 that week.

14 THE COURT: Okay. I will avoid those
15 dates. And so my order later today will also
16 schedule the next conference.

17 MS. CARTER: Thank you very much for, you
18 know, the time that the Court has given the parties.
19 We do appreciate it.

20 MR. WOLFE: Yeah. Thank you -- thank you
21 for indulging us, Your Honor.

22 THE COURT: No, of course. It was all very
23 helpful, and thanks for all the background
24 information.

25 Thank you very much, everyone.

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MS. CARTER: Thank you, Your Honor.

C E R T I F I C A T E

I, Marissa Lewandowski, certify that the foregoing transcript of proceedings in the case of Sphere 3D Corp. v. Gryphon Digital Mining, Inc., Docket #1:23-cv-02954-PKC-VF, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Lewandowski

Marissa Lewandowski

Date: July 3, 2024